No. SC 84659

IN THE SUPREME COURT OF MISSOURI

STATE ex rel. KATHLEEN DIEHL,

Relator,

v.

HONORABLE JOHN R. O'MALLEY
Judge, Division 6, Circuit Court
of Jackson County, Missouri,

Respondent.

Preliminary Writ of Prohibition to the Circuit Court
of Jackson County, Missouri – No. 01CV225722

BRIEF FOR RESPONDENT

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Dated: November 20, 2002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Pages**

Statutes and Constitutional Provisions

Other Authorities

JURISDICTIONAL STATEMENT

Respondents agrees with Relator's Jurisdictional Statement except for the statement that "money damages is the only relief sought" in this action. Relator's Br. at 5. To the contrary, as more fully discussed in the Argument sections below, the primary relief Relator seeks in this action is properly characterized as equitable.

SUMMARY OF ARGUMENT

This Court should not reach the merits of Relator's jury-trial argument; instead, the Court should quash its preliminary writ of prohibition as improvidently granted. In denying Relator's Motion for Jury Trial, Respondent acted in accordance with the uniform holding of *every* Missouri appellate decision to have addressed the existence of a jury trial under the Missouri Human Rights Act (the "MHRA"). Those decisions *uniformly* reject a jury-trial right, and go so far as to hold that it is *plain error* to empanel a jury on an MHRA claim. Respondent cannot be said to have flagrantly exceeded his jurisdiction by following the mandate of these unanimous decisions; in these circumstances, the extraordinary remedy of a writ of prohibition is simply unwarranted.

Even if the Court reaches the merits, under clearly established Missouri law this Court must reject Relator's contention that Article I, § 22 of the Missouri Constitution affords her a right to jury trial on her MHRA claims.

Although Relator argues that she is entitled to a jury trial because she seeks solely monetary relief, this is not the test under Missouri law for determining whether a constitutional right to a jury trial attaches. Article I, § 22 only *preserves* the right of jury trial "heretofore enjoyed" at the time Missouri's first constitution was adopted in 1820.

This Court has repeatedly held that, in order to determine whether a right to jury trial was "heretofore enjoyed," and therefore preserved by Article I, § 22, the court must determine how plaintiff's claims were treated in 1820. More particularly, where claims were created by statute after 1820, but would not have been actionable in 1820, no constitutional right to jury trial exists. The form of relief a plaintiff seeks is not controlling; indeed, even the cases *Relator* cites hold there is no right to jury trial in actions seeking solely monetary relief, because those claims were not historically resolved by juries.

Judged under the appropriate standards, Relator's constitutional argument must fail, because claims for age and sex discrimination were wholly foreign to the common law in 1820. In the 19th century, American and English law held that employment contracts were criminally enforceable by an employer (but not an employee) through summary, non-jury proceedings. American courts, including Missouri courts, then adopted the employment-at-will doctrine, under which an employee was dischargeable for any reason, or no reason at all, and could not state a claim for wrongful discharge absent a violation of an express written contract. Rules prohibiting age and sex discrimination were first recognized by statute, not by common law, and not until the mid- to late-20th century. This Court cannot hold that Missourians "heretofore enjoyed" a right to jury trial on age and sex discrimination claims in 1820, when those claims were not even viable at that time.

Nor are Relator's MHRA claims somehow "analogous" to claims recognized at common law. Relator's claims grow out of a mandatory, and complex, administrative scheme specified in detail in the MHRA. This procedural scheme emphasizes agency

investigation, conciliation and voluntary compliance. Moreover, under the MHRA a complaining party's employment discrimination claims are subject to hearing before the Missouri Human Rights Commission; if the Commission conducts such a hearing within 180 days of the filing of the complaint, the complainant has no power to opt out of such a hearing, but is remitted to seeking only judicial review under the Missouri Administrative Procedure Act. This complex administrative scheme is hardly analogous to any cause of action recognized by the common law, particularly in 1820.

Even if this Court concludes that the nature of the relief Relator seeks is a relevant consideration, Relator would still not be entitled to a jury trial. As noted above, under Missouri law a prayer for monetary relief does not equate to a right to jury trial. Moreover, Missouri caselaw (and caselaw under the analogous provisions of Title VII of the federal Civil Rights Act) recognizes that the primary relief Relator seeks – back pay, front pay, and attorney's fees – is primarily equitable and non-jury-triable. Therefore, even on her own terms, Relator's jury-trial argument fails.

Finally, Respondent closes by responding to an argument Relator apparently does not now pursue – that the MHRA itself grants her a right to a jury trial. Relator understandably abandons this statutory argument. The MHRA explicitly provides for civil actions brought "either before a circuit or associate circuit court *judge*," *not* a jury. § 213.111.1, R.S. Mo. (emphasis added). As if the plain words of the statute were not enough, the General Assembly enacted an amendment to the MHRA three years after the statute's passage, explicitly providing for trial by jury, but that amendment was vetoed by the Governor. The passage of this amendment establishes the Legislature's understanding

that the MHRA as originally enacted (and presently codified) does not provide for trial by jury. Finally, the predecessor to the MHRA initially provided for a trial by jury, but that provision was repealed. All of these circumstances clearly show that the Legislature had no intention of affording employees a jury trial on claims brought under the MHRA's unique procedures.

ARGUMENT

I. PROHIBITION IS NOT AN APPROPRIATE REMEDY HERE, AND THIS COURT SHOULD ACCORDINGLY DISCHARGE ITS PRELIMINARY WRIT OF PROHIBITION.

"Prohibition lies only where an act in excess of jurisdiction is clearly evidenced and there is no adequate remedy by way of appeal." *State ex rel. Southwestern Bell Tel. Co. v. Brown*, 795 S.W.2d 385, 387 (Mo. banc 1990) (quoting *State ex rel. Munn v. McKelvey*, 733 S.W.2d 765, 771 (Mo. banc 1987)). Relator has the burden of establishing Respondent usurped or acted in excess of his jurisdiction in denying Relator's motion for a jury trial. *State ex rel. Tarrasch v. Crow*, 622 S.W.2d 928, 937 (Mo. banc 1981) (citing *Eggers v. Enright*, 609 S.W.2d 381, 383 (Mo. banc 1980) and *State ex rel. McCarter v. Craig*, 328 S.W.2d 589, 591 (Mo. banc 1959)).

Relator cannot carry her burden to show, by "clear evidence," that Respondent acted in excess of jurisdiction by denying her a jury trial, or that an appeal is an inadequate remedy. Because she cannot satisfy her burden to show the need for extraordinary relief by prohibition, this Court's preliminary writ of prohibition should be quashed.

Every Missouri appellate decision which has considered the issue has held that there is no right to a trial by jury under the MHRA – indeed, those cases hold that "*it is plain error* to empanel a jury" on MHRA claims. *Cook v. Atoma Int'l of Am., Inc.*, 930 S.W.2d 43, 46 (Mo. App. E.D. 1996) (emphasis added); *Wentz v. Industrial Automation*, 847 S.W.2d 877, 880 (Mo. App. E.D. 1992) ("it is plain error for a case brought under the [MHRA], even if requesting only monetary relief, to be tried to a jury"); *Pickett v. Emerson Elec. Co.*, 830 S.W.2d 459, 460 (Mo. App. E.D. 1992) (reversible error to try MHRA claim to a jury); *State ex rel. Tolbert v. Sweeney*, 828 S.W.2d 929, 931 (Mo. App. S.D. 1992) (quashing writ which sustained demand for jury trial); *see also State ex rel. Missouri Comm'n on Human Rights v. Lasky*, 622 S.W.2d 762, 763 (Mo. App. E.D. 1981) (finding no right to jury trial under Missouri Discriminatory Employment Practices Act, the MHRA's predecessor statute).[1]

Because Respondent applied clearly established, uniform Missouri caselaw in denying Relator's Motion for Jury Trial, Respondent cannot be said to have exceeded his jurisdiction in issuing the challenged order. The Western District has suggested that no

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[1] Relator's claim (Br. at 14) that this Court rejected *Lasky* and *Sweeney* in *Hammons v. Ehney*, 924 S.W.2d 843, 848 (Mo. 1996), is a gross misstatement – *Hammons* merely held that the critical date for determining whether a common-law right to jury trial existed was 1820, when the *first* Missouri constitution was adopted, *not* 1945, as *Lasky* and *Sweeney* assumed. If anything, moving the constitutional "trigger date" back to 1820, as *Hammons* did, actually *strengthens* the reasoning of *Lasky* and *Sweeney*.

writ would properly issue in just these circumstances in *State ex rel. Wayside Waifs, Inc. v. Williamson*, 3 S.W.3d 390 (Mo. App. W.D. 1999): "While Plaintiff Hall did argue to the Court that she believed she had a right to jury trial on her MHRA claim also, she has not * * * suggested how the trial court acted outside its jurisdiction in applying the controlling law in this area, as necessary for issuance of a writ." *Id.* at 393 n.1[2].

Moreover, whatever the merits of Relator's jury-trial claim, the appropriate avenue to contest Respondent's ruling is an appeal after a bench trial, not an extraordinary writ. *State ex rel. Sexton v. Roehrig*, 19 S.W.2d 626, 628 (Mo. 1929) (quashing preliminary writ because relator's rights were protected pending appeal and "the adequacy or inadequacy of the remedy in the ordinary course of law does not depend merely upon the question of delay, expense or inconvenience"). Notably, each of the principal authorities on which Relator relies to support her argument determined the jury-trial issue in the

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[2] *State ex rel. Estill v. Iannone*, 687 S.W.2d 172 (Mo. banc 1985), on which Relator relies (Br. at 8), is not to the contrary – in *Estill*, this Court found that the circuit court's denial of relator's motion for a jury trial violated the applicable statute, the rules of procedure, and controlling caselaw. *Id.* at 173 ("[U]nder the pertinent statute, the rules of procedure and prior decisions, the relator is entitled to a jury trial and her request for that procedure must be granted."). Obviously, this case presents a dramatically different situation – as discussed in § III, *infra*, the MHRA specifies trial to the court, not a jury, and Respondent acted in accordance with, not contrary to, the unanimous view expressed by every reported Missouri decision addressing the relevant issue.

context of an appeal, *not* an extraordinary writ. *See Hammons v. Ehney*, 924 S.W.2d 843 (Mo. banc 1996) (appeal rejecting claim for jury trial in contribution action); *Bates v. Comstock Realty Co*., 267 S.W. 641 (Mo. banc 1924) (appeal rejecting jury trial in a suit to enforce a special tax bill as a lien on land); *Lee v. Conran*, 111 S.W. 1151 (Mo. 1908) (appeal ordering jury trial of suit to quiet title by accretion); *Briggs v. St. Louis & S.F. Ry. Co*., 20 S.W. 32 (Mo. 1892) (appeal ordering jury trial to determine attorney fees allowed by statute).

II. THERE IS NO CONSTITUTIONAL RIGHT TO A JURY TRIAL IN ACTIONS BROUGHT UNDER THE MISSOURI HUMAN RIGHTS ACT.

A. There is no Constitutional Right to a Jury Trial where a Plaintiff, Like Relator, Seeks to Enforce Statutory Rights Created after the Adoption of the Missouri Constitution.

Relying on *Hammons*, Relator argues that a jury right attaches wherever a party seeks only monetary relief. *See, e.g.*, Relator's Br. at 9.

But Relator's simplistic analysis misstates Missouri law. Under Missouri law, the determinative issue is *not* the nature of the relief a plaintiff requests, but the historical origin of plaintiff's cause of action.

As this Court has repeatedly held, Article I, §22 of the Missouri Constitution merely preserves the right to jury trial "as heretofore enjoyed" at common law – it does not expand that right. "[T]he phrase 'as heretofore enjoyed' has been interpreted to mean that the constitution protects the right as it existed when the [first] constitution was adopted [in 1820], *and does not provide a jury trial for proceedings subsequently*

created." *Hammons*, 924 S.W.2d at 847 (emphasis added); s*ee also, e.g.*, *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6, 11 (Mo. banc 1992) ("'Neither [the 1820 constitution] nor succeeding constitutions have created new rights to jury trial but have merely preserved from legislative and judicial encroachment that which the people previously enjoyed'"; quoting *Miller v. Russell*, 593 S.W.2d 598, 605 (Mo. App. W.D. 1979)); *Bates v. Comstock Realty Co.*, 267 S.W. 641, 644 (Mo. banc 1924).

As the quotation from *Hammons* shows, *a plaintiff has no right to a jury trial if she seeks to enforce a right first recognized after the adoption of Missouri's first constitution in 1820*. If a plaintiff relies on such a "proceeding[ ] subsequently created," *Hammons*, 924 S.W.2d at 847, the constitution does not provide for trial by jury.

This fundamental principle – which Relator wholly ignores – is illustrated by numerous cases decided by this Court, and by the Court of Appeals. Perhaps most prominently, this Court has consistently held that plaintiffs have no constitutional right to a jury trial in claims under Missouri's Worker's Compensation Law, Chapter 287, R.S. Mo. This Court has denied a jury trial in such cases for the specific reason that the Worker's Compensation Law creates a cause of action which was unknown to the common law, and which was created well after the adoption of the 1820 constitution.

This Court first addressed this issue in *DeMay v. Liberty Foundry Co.*, 37 S.W.2d 640 (Mo. 1931). *DeMay* emphasized that the substantive cause of action created by Missouri's Worker's Compensation Law was wholly unlike any cause of action existing at common law.

> [C]ompensation under the act is payable * * * wholly irrespective of any actionable negligence upon the part of the employer * * *. At common law, an employer is actionably liable to his employee for injuries suffered by the employee while acting within the course and the scope of his employment only when the employer has been guilty of * * * some negligent act or omission * * *. Thus, it is to be readily seen that the Workmen's Compensation Act of our State gives to the employee a new right or remedy, not theretofore available under the rules of the common law * * *.

Id. at 644-45. In rejecting the injured employee's claim of a constitutional right to trial by jury, the Court emphasized that the Workmen's Compensation Act created a cause of action unknown to the common law:

> Workmen's compensation acts are of recent origin, and proceedings looking to awards of compensation, and for the ascertainment and determination of claims for compensation (as distinguished from compensatory damages), were wholly unknown at common law, and, of course, came into existence long since the adoption of our present Constitution in 1875.

Id. at 648.

This Court followed *DeMay* in *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6 (Mo. banc 1992). In rejecting the injured worker's jury-trial claim, *Goodrum*, like *DeMay*, emphasized that the Workers' Compensation Law created a new, statutory remedy unknown at common law:

> The workers' compensation statutes were framed to provide *a new mode of recovery* for all claims arising from accidents in the course of employment, whether or not the employer could have been deemed negligent under the substantive law previously extant. * * * [I]n cases where the Commission properly determines the cause falls within its exclusive original jurisdiction as to workers' compensation claims, there is no right to jury trial and *DeMay* is applicable.

Id. at 11 (emphasis added).

If anything, the argument for a constitutional jury trial right was *stronger* in *DeMay* and *Goodrum* than it is here. In those cases, there *was* a pre-existing, common-law cause of action for workplace injuries (albeit one which required the employee to prove negligence). Yet this Court found that the statutory remedy was so different and new that no right to jury trial attached. As explained *infra* § II.C, the situation here is even clearer – there is *no* common-law antecedent for Relator's MHRA claims.

Other Missouri decisions recognize the same principle as *DeMay* and *Goodrum* – a plaintiff does not have a constitutional right to jury trial where she seeks to enforce rights first recognized after 1820. Thus, *Miller v. Russell*, 593 S.W.2d 598 (Mo. App. W.D. 1979), held that the constitution did not require that a jury determine whether a putative father was obligated to provide support for an illegitimate child. The court emphasized that no duty to financially support illegitimate children was recognized at common law.

> At the outset, it is appropriate to consider judicial precedent as to rights of illegitimate children and the assessment of responsibility for their welfare. At common law, the putative father owed no duty of support to his illegitimate child.

Id. at 601. *Miller* then held that there was no constitutional right to a jury determination of the support issue, *since the right to support was unknown at common law.*

> From previous comment in this opinion regarding the disability of illegitimate children at common law and the absence of any liability imposed on the putative father for support, it is apparent that no common law right to a jury trial existed. This follows for the reason that the right of the illegitimate child as earlier discussed above is of recent origin and in fact was not recognized until after adoption of the present Missouri Constitution in 1945.

Id. at 605. *Miller* was cited with approval by this Court both in *Hammons*, 924 S.W.2d at 849, and in *Goodrum*, 824 S.W.2d at 11. *See also Simpson v. Director of Rev.*, 710 S.W.2d 25, 26 (Mo. App. W.D. 1986) ("The driver's license suspension procedure and the accompanying right to trial de novo * * * did not exist prior to 1983. The right to a jury trial therefore may not be claimed to have been 'heretofore enjoyed' [ ] at common law * * *.").

These cases illustrate what should be obvious – no right to jury trial was "*heretofore enjoyed*" in Missouri with respect to causes of action first established *after* the adoption of the 1820 constitution. Since the Missouri Constitution merely preserves

the right to jury trial as it then existed, there can be no constitutional right to a jury trial in suits enforcing rights which post-date the constitution.

B. Even the Cases Relator Cites Recognize that Claims Seeking Monetary Relief Are not Always Jury-Triable.

As noted above, Relator ignores the well-established Missouri rule that there is no constitutional right to a jury trial with respect to causes of action created after 1820. Instead, Relator argues, relying primarily on Hammons TA \s "Hammons" v. Ehney, 924 S.W.2d 843 (Mo. 1996), that the fact that she seeks monetary relief should be dispositive, and mandates that she be afforded a jury trial. But even the cases Relator cites do not support her simplistic analysis.

Notably, Relator's syllogism – "if a prayer for monetary relief, then a right to jury trial" – was rejected in Hammons TA \s "Hammons" itself. Hammons declared that, although a prayer for a money judgment "normally" distinguishes legal from equitable remedies, "[t]his Court has recognized that courts sitting in equity may grant money judgments." 924 S.W.2d at 846. Accordingly, the Court "must look to the essential nature of the action, not merely the remedy sought," to determine whether a jury-trial right exists. Id. at 846 (emphasis added).

Relying on this analysis, *Hammons* itself held that a claim seeking only money damages was *not* triable by jury. *Hammons* was a contribution action between co-debtors. Although the defendant argued – like Relator here – that it was entitled to a jury because plaintiff was seeking only monetary relief, this Court rejected that simplistic analysis. Instead, the Court engaged in a thorough analysis of the historical origins of the

contribution cause of action in equity, and held that, because of its equitable origins, no constitutional right to a jury trial existed on a contribution claim between co-debtors, even though, in *Hammons*, that contribution claim resulted in a money judgment of $1,829,044.98. *Id*. at 848-49. *Hammons* clearly contradicts Relator's claim that a prayer for monetary relief, standing alone, determines the right to a trial by jury. *See also, e.g.*, *State ex rel. Dennis v. Williams*, 240 S.W.2d 703, 705 (banc 1951) (no constitutional right to jury trial on exceptions to commissioner's award in condemnation proceeding, even though only issue for determination is the amount of property owner's damages); *Smith v. Hendricks*, 136 S.W.2d 449, 452 (Mo. App. S.D. 1939) ("The fact that only a money judgment is prayed for is not an infallible test to determine that the action is at law and not in equity * * *."); *Grand Lodge v. Elsner*, 26 Mo. App. 108, 112 (E.D. 1887) (where interpleader historically treated as an action in equity, no right to jury trial; "And the fact that the recovery of money is the object of the proceeding, does not change the rule.").

Another of the cases Relator cites, *Lee v. Conran*, 111 S.W. 1151 (Mo. 1908), likewise looked well beyond the "issue tendered by the pleadings" to determine whether a claim was jury triable. *Lee* first determined "what the issue tendered by the pleadings is," but then examined "how the issue was triable before the adoption of that constitutional provision" in order to resolve the constitutional issue. *Id.* at 1153. The *Lee* Court found the issue before it, ownership of land created by accretion, to be an issue traditionally tried by jury. *Id.* However, although it recognized a constitutional right to jury trial, *Lee* did not involve any money judgment whatsoever; it was an action to quiet

title to land. The determinative factor in *Lee*'s jury trial holding was the historical treatment of the cause of action, and had nothing to do with the remedy requested by the parties.

In similar fashion, Relator's selective quotation from *Bates v. Comstock Realty Co*., 267 S.W. 641 (Mo. banc 1924), oversimplifies, and mis-states, Missouri law. *Bates* involved a suit on a special tax bill – namely, an action seeking to enforce a monetary liability. *Bates* noted that prior to 1875 parties frequently tried these issues to juries. *Id.* at 644. Nevertheless, *Bates* examined the nature and history of the proceeding before it, and determined the cause to be essentially one for the enforcement of a lien against the taxed property, and therefore an action in equity not triable to a jury. *Id.* at 645. "Notwithstanding a special execution was awarded, the proceeding as to its objective was essentially a suit in equity, and therefore not triable to a jury." *Id*.

Hammons, Lee and *Bates* all stand for the proposition that it is the history and nature of a cause of action – not merely whether it seeks monetary relief – that controls the jury-trial issue.[3] Indeed, both *Hammons* and *Bates* were actions seeking to enforce monetary claims, yet this Court held that the claims were not jury triable. And *Lee* found a historical right to a jury trial in quiet title actions concerning the accretion of land, even

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[3] Another case Relator cites (Br. at 12-13), *Meadowbrook Country Club v. Davis*, 421 S.W.2d 769 (Mo. banc 1967), likewise recognizes that the Constitution does not require a jury trial on exceptions to a commissioner's award in condemnation, which relates solely to money damages. *Id.* at 774.

though the plaintiff did not seek money damages. These cases refute Relator's argument that simply asking for a money judgment insures a right to jury trial.

Relator also relies on *Briggs v. St. Louis & S.F. Ry. Co.*, 20 S.W. 32 (Mo. 1892), to argue that the remedy requested is the decisive factor in establishing a right to jury trial. But *Briggs* analyzed the jury-trial issue based on a statute, § 2131, Rev. Stat. 1889, *not* on the basis of the constitution alone. Section 2131 provided: "An issue of fact in an action for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial be waived, or a reference ordered." Quoted in *Briggs*, 20 S.W. at 33. (*Rush v. Brown*, 14 S.W. 735, 736 (1890), cited in Relator's Brief at 13, relies on the same statute.)

Relator might indeed have a strong argument that she is entitled to a jury under § 2131, Rev. Stat. 1889, since she presents "issue[s] of fact in an action for the recovery of money only."[4] *But the statutory language quoted by Briggs was repealed in 1943*, and replaced by language calling for application of the Constitution's historical test for determining a right to jury trial. Mo. Laws 1943 at 353 §98; Thomas J. O'Neil, *Law or*

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[4] The statutory test clearly differs from the constitutional standard, by making a plaintiff's demand for monetary relief controlling. For example, under the old statutory test, an action in accounting would be tried to a jury, but under the historical test, would be bench tried. *See* Thomas J. O'Neil, *Law or Equity: The Right to Trial by Jury in a Civil Action*, 35 MO. LAW REV. 43, 45-46 (1970) (citing *Ely v. Coontz*, 67 S.W. 299 (Mo. 1902)).

Equity: The Right to Trial by Jury in a Civil Action, 35 MO. LAW REV. 43, 45-46 (1970). The current statute states in relevant part, "The right of trial by jury as declared by the constitution or as given by a statute shall be preserved to the parties inviolate." § 510.190, R.S. Mo. Since the middle of the 20th century, the historical analysis of "the essential nature of the action, not just the remedy sought" as described by *Hammons*, 924 S.W.2d at 846, *not* the statutory test upon which Relator and *Briggs* rely (which was repealed sixty years ago), should be applied to whether the right to a jury trial "was heretofore enjoyed" within the meaning of Article I, §22(a) of the Missouri Constitution.

Indeed, the Legislature's repeal of the statute on which *Briggs* – and, by implication, Relator – rely actually supports *Respondent's* position. "[I]n enacting a new statute on the same subject as that of an existing statute, it is ordinarily the intent of the legislature to effect some change in existing law." *State ex rel. Edu-Dyne Sys., Inc. v. Trout*, 781 S.W.2d 84, 86 (Mo. banc 1989); *see also, e.g., State v. Goebel*, 83 S.W.3d 639, 645 (Mo. App. E.D. 2002). By repealing § 2131, Rev. Stat. 1889, the Missouri Legislature has *rejected* the standard under which *all* "issue[s] of fact in an action for the recovery of money only" are jury triable. Instead, the Legislature has returned to the constitutional standard. By repealing § 2131, Rev. Stat. 1889, the Legislature has clearly recognized the distinction between these two tests, and has decreed that the fact that a plaintiff seeks only monetary relief is not controlling of the jury trial issue.

C. No Right to Jury Trial was "Heretofore Enjoyed" when the 1820 Constitution Was Adopted, Because the MHRA Creates a Cause of Action Wholly Unknown – and Directly Contrary – to 19th Century Common Law.

Relator would have had no right to sue her employer for age or sex discrimination in 1820, when the first state constitution was enacted. It cannot be said that a jury trial was "heretofore enjoyed" by plaintiffs whose claims would have been summarily rejected by common-law courts at the time of the constitution's adoption.

As this Court has recognized, the MHRA and its predecessor, the Missouri Discriminatory Employment Practices Act, created "a right and liability *which do not exist at common law.*" *See Yellow Freight Systems, Inc., v. Mayor's Comm'n on Human Rights*, 791 S.W.2d 382, 384 (Mo. banc 1990) (emphasis added; quoting *St. Louis-San Francisco Ry. Co. v. Mayor's Comm'n on Human Rights*, 572 S.W.2d 492, 493 (Mo. App. S.D. 1978) (both referring to city ordinance modeled on MHRA)).

Even a brief review of the history of Missouri employment law shows that *Yellow Freight* got it right – the MHRA, and similar anti-discrimination statutes enacted in the 1960s and thereafter, represent a radical departure from the existing common law of employment relationships.

Laws governing employment in England before 1820 would be unrecognizable to modern sensibilities. *See* Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. J. 85 (1982). British law during the early 1800's allowed criminal enforcement of

employment contracts against employees (but not employers) via summary procedures, without juries. *See* Andrew P. Morriss, *Exploding Myths: An Empirical and Economic Reassessment of the Rise of Employment At-Will*, 59 MO. L. REV. 679, 761 (1994). American law diverged from British employment law during the 19th century, and increasingly accepted the doctrine of employment at will, that is, "an employer may discharge an employee at any time, without cause or reason, or for any reason and, in such case, no action can be maintained for wrongful discharge." *Christy v. Petrus,* 295 S.W.2d 122, 124 (Mo. 1956) (stating Missouri's long-established rule).

By the late 19th century, Missouri courts had adopted the employment-at-will doctrine. *See, e.g., Brookfield v. Drury College*, 123 S.W. 86, 94 (Mo. App. S.D. 1909) ("the law in this state has been well stated" that employment at will prevailed and that "no action can be sustained in such case for a wrongful discharge."); *Finger v. Koch & Schilling Brewing Co.*, 13 Mo. App. 310 (E.D. 1883) ("An indefinite hiring, at so much per day, per month, or per year, is a hiring at will, and may be terminated by either party at any time.").

Clearly, against this backdrop Relator's cause of action would never have been heard by a jury at the time of the first state constitution – it would not have been heard at all. A cause of action based on employment discrimination on the basis of sex and age arose in the latter part of the 20th century by statute, not by common law. Sex discrimination was made an unlawful employment practice by amendment to the Missouri Discriminatory Employment Practices Act in 1965, §296.020, R.S. Mo. Supp. 1965, one year after passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§ 2000(e)–2. Prohibition of age discrimination came even later: this prohibition was first included in state employment law with passage of the MHRA *in 1986*. § 213.055, R.S. Mo. (The federal cause of action for age discrimination, the Age Discrimination in Employment Act, became law in 1967. 29 U.S.C. §§ 621 *et seq*.)

Given that, in 1820, Relator would have had *no claim whatsoever* for age or sex discrimination (or for any action "of like nature" (NELA *Amicus* Br. at 5, 7) for that matter), no right to jury trial was "heretofore enjoyed" at that time. Relator's constitutional argument must be rejected.[5]

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[5] While Relator's *amicus* (NELA Br. at 6) cites to cases from other States construing *their* anti-discrimination laws, this case involves claims under a *Missouri* statute, and a jury-trial argument under the *Missouri* Constitution, as interpreted by *Missouri* courts. Despite the irrelevance of these out-of-state cases, Respondent notes that many such decisions recognize that the constitutional right to jury trial is inapplicable in circumstances like the present, even where the relevant State's statute explicitly provides for recovery of legal relief or actual damages. *See, e.g., Wertz v. Chapman Township*, 741 A.2d 1272 (Pa. 1999); *DiCentes v. Michaud*, 719 A.2d 509, 512-13 (Me. 1998); *Smith v. ADM Feed Corp.*, 456 N.W.2d 378, 382-84 (Iowa 1990); *Shaner v. Horizon Bancorp*, 561 A.2d 1130 (1989) (superseded by statute), and the additional cases collected in the cited decisions.

D. The MHRA is not "Analogous" to Common-Law Actions, since it Creates a Special Statutory Action Emphasizing the Elimination of Discriminatory Practices by Administrative Investigation and Conciliation.

The MHRA establishes a special administrative process to resolve employment claims by eliminating discriminatory practices quickly and, if possible, voluntarily. This statutory procedure is unlike anything known to the common law, in 1820 or today. Because this special statutory procedure post-dates the adoption of Missouri's first constitution by more than 160 years, Relator has no constitutional right to a trial by jury; Article I, § 22(a) "does not provide a jury trial for proceedings subsequently created." *Hammons*, 924 S.W.2d at 848. Relator's jury-trial argument must fail, even if the proper inquiry were whether Relator's MHRA cause of action is "analogous" to a common-law action.

It is noteworthy that neither Relator's Brief, nor the Brief of her *amicus*, contains *any* description of the process created by the MHRA for the resolution of employment discrimination claims, even though Relator was required to follow this process before filing her lawsuit, and an understanding of this process is critical to understanding the nature of Relator's claims. Respondent supplies this omission here.

A review of the MHRA claim-filing process shows that that process is wholly unlike any procedure known at common law. Under the MHRA, a party claiming employment discrimination must file a written complaint with the Missouri Commission on Human Rights within one hundred eighty days of the alleged act of discrimination.

§ 213.075.1, R.S. Mo. The filing of a complaint charges the Commission with the obligation to "promptly investigate the complaint," and, if probable cause exists to credit the complaint, the Commission's Director must "immediately endeavor to eliminate the unlawful discriminatory practice complained of by conference, conciliation and persuasion." § 213.075.3.

In the event that conciliation efforts fail, the Commission may hold a formal hearing concerning the complaint's allegations:

> In case of failure to eliminate such discriminatory practice as found in the investigation, if in the judgment of the chairperson of the commission circumstances so warrant, there shall be issued and served in the name of the commission, a written notice together with a copy of the complaint, as it may have been amended, requiring the person named in the complaint, hereinafter referred to as "respondent," to answer the charges of the complaint at a hearing, at a time and place to be specified in the notice, before a panel of at least three members of the commission sitting as the commission or before a hearing examiner licensed to practice law in this state who shall be appointed by the executive director and approved by the commission. The place of the hearing shall be in the office of the commission or such other place designated by it, except that if the respondent so requests, in writing, the hearing shall be held in the county of such person's residence or business location at the time of the alleged

> unlawful discriminatory practice. A copy of the notice shall also be served on the complainants.

§ 213.075.5. The Commission may permit the complaining party to intervene and fully participate in the hearing. § 213.075.7. The statute specifies rules for pleading, discovery, and the conduct of the hearing itself. *See* §§ 213.075.7-.10.

The statute specifies that, after hearing, the Commission's hearing panel shall issue findings of fact and conclusions of law. § 213.075.11. In the event the hearing panel determines that a discriminatory practice has occurred,

> the commission shall issue and cause to be served on the respondent an order requiring the respondent to cease and desist from the unlawful discriminatory practice. The order shall require the respondent to take such affirmative action, as in the panel's judgment will implement the purposes of this chapter, including, but not limited to, payment of backpay; hiring; reinstatement or upgrading; * * * payment of actual damages; and the submission of a report of the manner of compliance.

§ 213.075.11(1).

To the extent the case is heard by a hearing examiner, rather than a panel of Commissioners, the statute provides for appeal to a panel of at least three Commissioners. § 213.075.14. Whether the complaint is heard by a hearing examiner or a panel of three Commissioners in the first instance, the statute provides that "[a]ny person aggrieved by an order of the commission may appeal as provided in chapter 536, RS Mo." – namely, the Missouri Administrative Procedure Act. *See* § 213.075.16.

Notably, although the MHRA permits complainants alleging *other* forms of discrimination (such as housing or lending discrimination) to "opt out" of the Commission hearing procedure and proceed directly in court, *see* § 213.076, no such "opt out" right is given to complainants alleging "Unlawful Employment Practices" under § 213.055, R.S. Mo. Instead, an employment-discrimination complainant may *only* proceed in court if, after the complaint has been pending for one hundred eighty days, "the commission has not completed its administrative processing," and the complainant requests in writing that the Commission issue a letter indicating the complainant's right to bring a civil action. § 213.111.1. Should the Commission resolve the complaint before issuance of a notice of right to sue, no right to a trial exists, other than as an appeal of an administrative order under Chapter 536. *Id.* The complainant must file the lawsuit within ninety days of issuance of the letter. § 213.111.1.

The MHRA is obviously designed to bring about a swift resolution to complaints of discrimination, with an emphasis on voluntary elimination of discriminatory practices, and administrative investigation, conciliation, and hearing, rather than by giving complainants *carte blanche* to bring their action in court. The special administrative prerequisites, emphasis on conciliation and short limitations periods all serve the equitable remedial purpose of the statute and distinguish it from ordinary tort private actions. *Sweeney*, 828 S.W.2d at 934-35. Such an administrative procedure – designed to remedy a public problem rooted in issues of fairness – more closely resembles procedures which have been held not to require jury trials than it does private injury actions. In *Percy Kent Bag Co v. Missouri Commission on Human Rights*, 632 S.W.2d

480 (Mo. 1982), a case arising under the MHRA's predecessor statute, this Court quoted with approval the U.S. Supreme Court's rejection of a seventh amendment jury trial challenge to the Occupational Health and Safety Act.

> In cases where public rights are being litigated and which do not involve purely 'private rights' (as is true here), the seventh amendment does not prohibit Congress from assigning a fact finding function and initial adjudication to an administrative forum where a jury would be incompatible with the public policy.

Id. at 485 (quoting *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977)).

Relator's (apparent) argument that her claims are analogous to tort claims must also fail. To the contrary, Missouri courts have recognized the *differences* between MHRA claims and traditional tort claims. Thus, based on the differences between common law torts and the MHRA, a Missouri appellate court has held that tort standards for emotional distress damages are inapplicable in MHRA actions. *Missouri Comm'n on Human Rights v. Red Dragon Restaurant, Inc.*, 991 S.W.2d 161, 170 (Mo. App. W.D. 1999), explained that emotional distress damages in tort actions are distinguishable from civil rights damages because "a civil rights claim is not analogous to a tort claim for intentional infliction of emotional distress." *Id.* at 170. "The interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law of torts." *Id.* (quoting *Bolden v. Southeastern Penn. Transp. Auth.*, 21 F.3d 29, 35 (3d Cir. 1994)).

Along those same lines, this Court has emphasized that the remedies afforded by the MHRA are intended primarily to vindicate public, not private, interests. Examining the enforcement authority of the Missouri Commission on Human Rights, this Court in *Percy Kent Bag* distinguished between litigation of purely private rights and the public rights litigated under the MHRA predecessor law. 632 S.W.2d at 485. "Although such an award [back pay] will inure to the benefit of the discharged employee, it is incidental to the power of the Commission to enforce compliance with the policy of nondiscrimination in employment." *Id.* at 481.[6]

E. The Relief Relator Seeks is Primarily Equitable, and any Incidental Legal Relief Relator Seeks is Properly Tried to the Court.

As explained above, in assessing whether Relator is entitled to a jury trial, the determinative issue is the nature and history of Relator's MHRA cause of action, not the relief she seeks. However, even if the relief Relator prays for were relevant, the fact that

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[6] Relator's reference to jury trials on claims of retaliation for exercising worker's compensation rights (Br. at 15 n.1) misses the mark. First, Relator cites no case actually addressing whether the constitution requires a jury trial for such claims. Second, the relevant statutes are completely different. The Worker's Compensation Law merely provides that a retaliation victim "shall have a civil actIon for damages against his employer," § 287.780, R.S. Mo., while the MHRA defines retaliation as itself an "unlawful discriminatory practice," § 213.070.2, R.S. Mo., subject to the special administrative procedures, and remedies, described in the text.

that relief is primarily equitable and non-jury-triable adds further support for Respondent's Order.

Relator's Petition and Amended Petition in the underlying case assert a claim for back pay and front pay by specifically stating "plaintiff has sustained and will continue in the future to sustain, damages in the form of lost salary . . ." Exhibits A and B to Relator's Petition for Writ of Prohibition ¶ 15. Relator also seeks a statutory award of attorney's fees. *Id.* at prayer for relief.

These three forms of relief – back pay, front pay, and attorneys fees – are clearly equitable, non-jury-triable remedies. This Court has recognized that "a back pay award differs from a civil suit damages award. A back pay award 'may involve a monetary award, but such awards have specific limitation' * * * and is based on objective, easily ascertained information." *Percy Kent Bag Co*., 632 S.W.2d at 483 (quoting *State Human Rights Commission v. Pauley*, 212 S.E.2d 77, 81 (W.Va. 1975)).

It is well established that back pay is an equitable form of relief, since it is intended to make a plaintiff whole, in the manner of restitution, for the unlawful denial of compensation prior to trial. Under Title VII, federal courts have repeatedly held that back pay in an employment discrimination case is an equitable remedy, which does not justify a jury trial. *See*, *e.g.*, *Curtis v. Loether*, 415 U.S. 189, 197 (1974) ("back pay is an integral part of an equitable remedy, a form of restitution"); *Wilson v. Belmont Homes, Inc.*, 970 F.2d 53, 55 & n.7 (5th Cir. 1992) (noting "our longstanding rule that back pay under Title VII is an equitable remedy. No circuit court that has considered the issue has held that jury trials are available under Title VII."; collecting cases). Similarly, the

United States Supreme Court recognized that a District Court's authority to award back pay under Title VII was "equitable in nature," and explained the broad sweep of appropriate equitable relief for an economic injury:

> [W]here a legal injury is of an economic character, "[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. * * * The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not bee committed."

Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-19 (1975).

Front pay, money awarded in lieu of reinstatement, is an equitable remedy as well. *Altenhofen v. Fabricor, Inc*., 81 S.W.3d 578, 594 (Mo. App. W.D. 2002). Finally, a Missouri court has held that the reasonableness of a party's attorney's fees is not properly triable to a jury, but should instead be tried to the court, which is "expert on attorney's fees." *State ex rel. Chase Resorts v. Campbell*, 913 S.W.2d 832, 835 (Mo. App. E.D. 1995).

Thus, despite her repeated references to the fact that she seeks monetary relief, the relief Relator seeks is not primarily *legal* in nature, but is rather properly characterized as equitable. Relator is not entitled to a jury trial on that basis.

Given that the principal forms of relief Relator seeks are equitable, the circuit court, sitting without a jury, has full authority to resolve Relator's claim for actual and punitive damages. Under the equitable clean-up doctrine, a court sitting in equity may grant relief which would normally be granted at law where necessary to do complete

justice. *Craig et al. v. Jo B. Gardner, Inc. et al.*, 586 S.W.2d 316, 325 (Mo. banc 1979) (granting quantum meruit relief in an equitable action). "It is a well settled maxim that equity, once having acquired jurisdiction of a cause, will not relinquish it without doing full and effective justice between the parties, even though, to right the wrong complained of, resort must be had to a remedy within the traditional province of law . . ." *Perry v. Perry*, 484 S.W.2d 257, 259 (Mo. 1972) (entering general judgment for insurance policy proceeds to impress a trust). A court in equity will adapt relief to the circumstances of the particular case "where the necessities of the situation require this type of relief." *Willman v. Beheler*, 499 S.W.2d 770, 778 (Mo. 1973) (court empowered to enforce covenant not to compete through its equity jurisdiction); *see also Licare v. Hill*, 879 S.W.2d 777, 779 (Mo. App. 1994) (equitable clean-up doctrine permitted circuit court, sitting in equity, to award money damages for breach of contract); *Thornburgh v. Poulin*, 679 S.W.2d 416, 417-18 (Mo. App. S.D. 1984) (under equitable clean-up doctrine, no constitutional violation where trial court, sitting without a jury, resolved plaintiff's claims seeking actual and punitive damages, where plaintiff also requested injunctive relief).

Much as a court in equity orders full relief to do equity, the MHRA added actual and punitive damages to the potential relief for one aggrieved by violation of the statute to afford complete justice. *State ex rel. Tolbert v. Sweeney*, 828 S.W.2d 929, 935 (Mo. App. S.D. 1992) (citing *State ex rel. Willman v. Sloan*, 574 S.W.2d 421, 422 (Mo. banc 1978)). "Equity will not suffer a wrong to be without a remedy, and seeks to do justice and avoid injustice." *Willman*, 499 S.W.2d at 778.

Quite apart from the *specific* relief Relator seeks in this action, a review of the full range of remedies available under the MHRA reveals that the essential nature of Relator's cause of action is equitable. Whether the forum is a court or the Commission, the broad remedial purpose of the MHRA, which was designed to avoid and eliminate employment discrimination, exemplifies traditional equity actions. *Sweeney*, 828 S.W.2d at 935-36; *see also Shaner v. Horizon Bancorp*, 561 A.2d 1130, 1134 (N.J. 1989) s*uperceded* by statute. The MHRA authorizes the Commission to issue an order requiring an employer to cease and desist discriminatory practices, require affirmative action to implement the purposes of the MHRA, including payment of backpay, hiring, reinstatement or upgrading, payment of actual damages, compliance reporting and civil penalties. § 213.075.11, R.S. Mo. Alternatively, the court may grant any permanent or temporary injunction, temporary restraining order, or other order, actual and punitive damages, court costs and reasonable attorney fees. § 213.111.2, R.S. Mo. The MHRA clearly contemplates broad equitable solutions to effectuate the purpose of the statute. To focus narrowly on only the legal remedies included to make the victim whole unnecessarily constrains the Commission or court at the expense of creative broad solutions available only in equity. *Sweeney*, 828 S.W.2d at 935; *Shaner*, 561 A.2d at 1134-35.[7]

[7] Relator's *amicus* argues that, in enacting the MHRA, "the Missouri General Assembly viewed back pay as a legal remedy." NELA Br. at 11. But that ignores: that the MHRA was clearly patterned on its federal counterpart, Title VII of the Civil Rights Act of 1964; that damages are awardable *only* after exhaustion of the special

III. THE MISSOURI HUMAN RIGHTS ACT PROVIDES NO STATUTORY RIGHT TO A TRIAL BY JURY.

Relator fails to mention or challenge *Sweeney's* holding that the MHRA does not provide a *statutory* jury trial right. Relator's silence on this point is understandable.

The MHRA's predecessor statute, the Discriminatory Employment Practices Act (Chapter 296, R.S. Mo.), enacted in 1961, prohibited discriminatory employment practices and authorized the Missouri Commission on Human Rights to initiate, receive and investigate complaints. Upon finding probable cause to believe the complaint's allegations, the Commission attempted to eliminate the discrimination using conciliation, and failing at conciliation, held a hearing, and issued findings and orders.

As originally enacted, the Discriminatory Employment Practices Act provided for judicial review of Commission orders by trial de novo, and explicitly provided for trial by jury on written request. § 296.050.1, R.S. Mo. (Supp. 1961) This explicit jury trial provision was repealed in 1965, and replaced by judicial review under Chapter 536, R.S. Mo., the Missouri Administrative Procedure Act, which did not allow a trial by jury.

In 1986, Chapter 296 was repealed and replaced by current Chapter 213. The current statute continues to require every action under the MHRA to commence by filing a complaint with the Commission. If the Commission hears the case and issues orders,

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administrative process described above; and that damages are only referenced in the statute *after* the reference to clearly equitable relief – a "permanent or temporary injunction, [or] temporary restraining order." § 213.111.2, R.S. Mo.

the current statute provides for judicial review of Commission orders in the manner provided by Chapter 536. § 213.085 R.S. Mo.

If, however, the Commission has not completed processing the complaint 180 after filing, the Commission must issue a letter upon written request and "such action may be brought * * * *either before a circuit or associate circuit judge*". § 213.111.1, R.S. Mo.(emphasis added).

By specifying that an action shall be brought "before a circuit or associate circuit *judge*," the MHRA's plain language clearly contemplates a bench trial. *See Sweeney*, 828 S.W.2d at 931-32. "Where the language of the statute is unambiguous, courts must give effect to the language used by the legislature. * * * There is no room for construction even when the court may prefer a policy different from that enunciated by the legislature." *Keeney v. Hereford Concrete Products, Inc.*, 911 S.W.2d 622, 624 (Mo. banc 1995) (citing *Kearney Special Road Dist. v. County of Clay*, 863 S.W.2d 841, 842 (Mo. 1993)).

It is also noteworthy that an amendment to the MHRA passed by the General Assembly in 1989 provided that "such action shall be tried before a jury if one is requested by either party." This amendment was vetoed by the Governor. (Certified copies of the amendment and veto are attached in the Appendix to this Brief.) Amendatory legislation can be properly considered in interpreting the original statute. *City of Willow Springs v. Missouri State Librarian*, 596 S.W.2d 441, 445-46 (Mo. banc 1980); *State ex rel. Danforth v. David*, 517 S.W.2d 56, 58 (Mo. 1974). Passage of the 1989 amendment further demonstrates that the legislature did not intend the 1986 statute

to allow a jury trial, for when the legislature amends a statute, it must be presumed to have intended the change to have some effect and make some substantive change in the law. *Sermchief v. Gonzales*, 660 S.W.2d 683, 688-89 (Mo. banc 1983); *State v. Swoboda*, 658 S.W.2d 24, 26 (Mo. 1983).

Given the plain meaning of the statute, which provides for civil actions "brought * * * before a circuit or associate circuit judge," the attempted amendment to add a jury trial right to the statute, and the history of an express grant, and later repeal, of a jury trial provision in the predecessor statute, there is no basis to hold that the MHRA itself provides for trial by jury.

CONCLUSION

Respondent correctly applied Missouri law when he denied Relator's Motion for Jury Trial. The Missouri Constitution does not grant Relator the right to a jury trial on her Missouri Human Rights Act claim, because the nature of Relator's action – redress for alleged sex and age discrimination – was wholly unknown, and indeed antithetical, to the common law before enactment of the 1820 constitution. The Missouri Human Rights Act is equitable and administrative in nature, and the cause of action it creates is not analogous to any common law action. Further, Relator's Petition seeks relief which is properly characterized as equitable and non-jury-triable. Relator has no right to a jury trial, either under the MHRA or the Missouri Constitution. For all of the foregoing reasons, Respondent respectfully requests that the Court quash the Preliminary Writ in Prohibition.

Respectfully submitted,

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Dated: November 20, 2002

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Brief for Respondent, together with a copy of the brief on diskette, was hand delivered, on this 20th day of November, 2002 to the following:

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I further certify that a copy of the above and foregoing Brief for Respondent, together with a copy of the brief on diskette, was served by first class mail, postage prepaid, on this 20th day of November, 2002, addressed to the following:

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Attorney for Amicus Curiae St. Louis Chapter
of the National Employment Lawyers Association

The Honorable John R. O'Malley
Circuit Court of Jackson County, Missouri
415 East 12th Street
Kansas City, Missouri 64106

Respondent

_____
An Attorney for Respondent

CERTIFICATE OF COMPLIANCE REQUIRED
BY SUPREME COURT RULE 84.06(C)

The undersigned hereby certifies the following:

1. I am an attorney practicing law with the law firm of Lathrop & Gage L.C., 2345 Grand Boulevard, Kansas City, Missouri 64108-2684. My telephone number is (816) 292-2000. My Missouri Bar Number is indicated below.

2. I am one of the attorneys submitting the foregoing Brief for Respondent.

3. The foregoing Brief complies with the limitations contained in Supreme Court Rule 84.06(b). Based on the word-counting feature of the Word 2002 software used to prepare this Brief, the Brief contains 9,148 words.

4. I have filed a copy of the foregoing Brief with the Court on diskette, and have served a copy of that diskette on each adverse party. The diskettes have been scanned for virus, and are virus-free.

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A P P E N D I X